No. 83-643

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH ADAMS, ET AL., PETITIONERS

v.

TERREL H. BELL, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit correctly construed the terms of prior judicial decrees in this case not to provide a basis for the district court to enjoin the Secretary of Education from entering into a settlement of an administrative enforcement proceeding under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and related litigation in the United States District Court for the District of North Carolina involving the University of North Carolina system.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-107a) is reported at 711 F.2d 161. The prior opinion of the panel of the court of appeals is not reported. The opinion of the district court (Pet. App. 109a-119a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 120a-122a) was entered on May 19, 1983. On July

21, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 17, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, are set forth at Pet. App. 123a-125a.

STATEMENT

1. a. The instant certiorari petition involves an offshoot of a suit commenced in 1970 in the United States District Court for the District of Columbia challenging the alleged failure by the Department of Health, Education, and Welfare (HEW) to enforce Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), which prohibits discrimination in programs receiving federal financial assistance. The suit broadly challenged HEW's enforcement activities with respect to desegregation in 10 state systems of higher education and numerous elementary and secondary school districts. *Adams* v. *Richardson*, 351 F. Supp. 636 (D.D.C. 1972). The instant proceeding concerns one of the state systems of higher education, that of North Carolina.

The district court held in 1973 that once HEW found an actual or presumptive violation of Title VI, it could not indefinitely postpone enforcement action in favor of seeking voluntary compliance. The court accordingly ordered HEW to commence enforcement proceedings by administrative notice of a hearing or other means authorized by law to obtain compliance by the 10 state systems of higher education. *Adams*

v. *Richardson*, 356 F. Supp. 92, 94-95 (D.D.C. 1973).[1]

The court of appeals substantially affirmed the district court's order. *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc). The court emphasized that the suit was not brought "to challenge HEW's decisions with regard to a few school districts in the course of a generally effective enforcement program," but rather alleged that "HEW ha[d] consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty" (*id.* at 1162). Accordingly, the court stressed: "In this suit against the agency, in contrast to actions brought against individual school systems, our purpose, and the purpose of the District Court order as we understand it, is not to resolve particular questions of compliance or noncompliance" (*id.* at 1163 (footnote omitted)). Instead, the court stated, the district court's order "merely requires initiation of a process which, excepting contemptuous conduct, will then pass beyond the District Court's continuing control and supervision" (*id.* at 1163 n.5).

b. Pursuant to the district court's injunction, HEW sought compliance by the 10 state systems of higher education. The desegregation issues concerning Louisiana and Mississippi eventually were referred to the Department of Justice, but the desegregation plans proposed by the remaining eight states, including North Carolina, were found acceptable in June of 1974. However, by supplemental order dated April

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[1] The 10 states were North Carolina, Louisiana, Mississippi, Oklahoma, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia. Similar injunctive relief was ordered with respect to the elementary and secondary school districts. 356 F. Supp. at 95-99.

1, 1977, the district court found that the plans of six of these states, again including North Carolina, were unacceptable. The court noted that the plans failed to meet the requirements HEW itself had identified as requirements for an acceptable plan and that HEW did not dispute that the plans had failed to achieve progress in achieving desegregation. *Adams* v. *Califano*, 430 F. Supp. 118, 119-120 (D.D.C. 1977).[2] The district court therefore ordered HEW to develop final guidelines for acceptable higher education desegregation plans, to require the six states to submit revised plans, and to accept or reject those plans within a specified time frame (*id.* at 121).

Following the April 1, 1977 order, HEW promulgated guidelines (42 Fed. Reg. 40780) and obtained compliance in five of the six states concerned.[3] Only North Carolina remained out of compliance. Therefore, HEW, on March 29, 1979, filed a notice of an administrative hearing in accordance with Section 602 of Title VI, 42 U.S.C. 2000d-1, to determine whether financial assistance to the higher education system of North Carolina should be terminated.

c. After HEW issued the notice, the State of North Carolina filed suit against HEW and other federal agencies in the United States District Court for the Eastern District of North Carolina, assert-

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[2] The district court declined to take any action with respect to Louisiana and Mississippi because of pending judicial enforcement proceedings, with respect to Maryland because of litigation pending in the Fourth Circuit, and with respect to Pennsylvania because of ongoing settlement negotiations (430 F. Supp. at 119-120).

[3] HEW subsequently promulgated "Revised Criteria" to serve as a guide in developing voluntary desegregation plans in all states. See 43 Fed. Reg. 6658 (1978).

ing a variety of constitutional and statutory challenges to HEW's administrative action. In addition, the State sought to enjoin HEW from deferring federal financial assistance while any administrative hearing was in progress. HEW opposed these motions and sought a transfer of the State's action from North Carolina to the District of Columbia pursuant to 28 U.S.C. 1404(a).

By order of May 23, 1979, the district court in North Carolina denied HEW's motion for a change of venue. On June 8, 1979, the district court in North Carolina also denied the State's motion to enjoin the Title VI administrative hearing, but it granted the State's motion to enjoin the deferral of federal funds while the hearing was in progress. The district court retained jurisdiction over North Carolina's action but stayed judicial proceedings pending completion of the administrative hearing. See *North Carolina* v. *HEW*, 480 F. Supp. 929 (E.D. N.C. 1979).[4]

The hearing was conducted in the Department of Education—the successor to HEW with respect to education matters (20 U.S.C. 3401 *et seq.*)—before an administrative law judge. Petitioners herein were permitted to intervene for the limited purpose of supplementing the government's case if the administra-

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[4] Dissatisfied with this result, petitioners applied to the district court in the District of Columbia for injunctive relief against HEW to require the same deferral of funds that had been prohibited by the district court in North Carolina. The District of Columbia court, after "careful analysis" of the different nature of the two proceedings, felt "compelled by basic principles of comity, including the avoidance of irreconcilable judicial mandates, to deny" the request for injunctive relief. *Adams* v. *Harris*, Civ. No. 70-3095 (D.D.C. Oct. 18, 1979), slip op. 8.

tive law judge was persuaded that they had something relevant to add. *In re State of North Carolina and the Board of Governors of the University of North Carolina*, E.D. Docket No. 79-VI-1 and HUD Docket No. 79-4 (Order of Aug. 13, 1979). The parties completed presentation of their affirmative cases by the Spring of 1981. The record of the proceeding by that time consisted of approximately 15,000 pages of testimony and more than 500 exhibits (C.A. App. 35, 119).

2. While the administrative hearing was still in progress, counsel for petitioners were informed by the Department of Education that the Secretary was considering a proposal to settle the dispute with North Carolina. A copy of the proposed settlement was delivered to counsel with this letter (C.A. App. 10-11). Petitioners also were informed that the Secretary expected to decide shortly whether or not to accept the proposed settlement and that, if accepted, the settlement would be filed in the North Carolina district court in the form of a consent decree, subject to that court's approval.[5]

On June 25, 1981, petitioners filed a motion in the district court for the District of Columbia for a temporary restraining order and preliminary injunction to prevent the Secretary from entering into the proposed agreement with North Carolina (Pet. App. 118a-119a). The district court denied both motions at the conclusion of a hearing on June 25, 1981 (*id.* at 109a-119a). Relying heavily on the District of Columbia Circuit's 1973 en banc opinion, the district court reasoned that its earlier injunctive order was

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[5] Letter from Frank K. Krueger, Office for Civil Rights, Dep't of Education, to Joseph Rauh (June 22, 1981).

not meant "to resolve particular questions of compliance or non-compliance" and that after initiation of the enforcement process, that process "pass[ed] beyond the District Court's continuing control and supervision" (Pet. App. 113a (quoting *Adams* v. *Richardson*, 480 F.2d at 1163 & n.5)). The court therefore concluded that its continuing supervision of the Department's enforcement actions regarding the North Carolina higher education system had come to an end (Pet. App. 113a-117a).

Petitioners immediately appealed the district court's denial of injunctive relief and requested the District of Columbia Circuit to grant an emergency injunction pending appeal. The request for an emergency injunction was denied by the court of appeals by order dated June 30, 1981. Accordingly, the Secretary went forward with the settlement with North Carolina.

The formal agreement between the parties was embodied in a proposed consent decree (C.A. App. 32-101) submitted to the district court in North Carolina in connection with the 1979 lawsuit that was still pending in that jurisdiction. Counsel for petitioners were given notice of a hearing on the matter and appeared amicus curiae to oppose entry of the consent decree, but they did not seek to intervene.

On July 17, 1981, the North Carolina district court approved the consent decree and filed an opinion explaining its decision. *North Carolina* v. *Dep't of Education*, No. 79-217-CIV-5 (E.D.N.C.) (C.A. App. 119-126). The court concluded upon consideration of many factors and materials—including the terms of the proposed consent decree, the parties' supporting memoranda, petitioners' amicus brief in op-

position, and the administrative record—that the settlement was "fair, reasonable and adequate" (C.A. App. 120-121). The court found that the settlement terms reflected substantial compliance with the 1977 criteria for higher education desegregation plans (*id.* at 121) and that departures from those criteria were justified in light of the evidence adduced at the administrative hearing and the progress that had been made in the intervening years (*id.* at 121, 122, 124, 125).

In addition, the court expressed the view that the settlement was not "in any way violative of either the district court or circuit court orders" in the *Adams* case (C.A. App. 123). Noting its "utmost respect for the rulings of Judge Pratt in the *Adams* litigation," the North Carolina court reiterated "its understanding of the demarcation line between the jurisdictions of the two courts" and its conclusion that the injunctive decrees issued in *Adams* did not extend to the resolution of the "particular questions of compliance or non-compliance with Title VI" at issue in the North Carolina litigation (*ibid.*). The court therefore entered the consent decree and retained jurisdiction to monitor continued compliance by North Carolina (C.A. App. 41).

3. Although the District of Columbia Circuit had denied petitioners' request for emergency relief pending appeal and the North Carolina court thereafter had approved the settlement petitioners' sought to enjoin, petitioners nevertheless persisted with their appeal in the District of Columbia Circuit. A divided panel of the court of appeals ruled on August 24, 1982 that the appeal must be dismissed on mootness and comity grounds. At petitioners' suggestion, however, the full court of appeals granted rehearing

en banc and vacated the panel's decision (Pet. App. 121a-122a).

In an opinion dated June 10, 1983, the en banc court affirmed the district court's denial of further injunctive relief (Pet. App. 1a-21a). The court held that "Judge Pratt correctly interpreted the initial decree not to extend to supervision of the Department's settlement of its enforcement action against North Carolina" and affirmed his ruling that "the injunction requested in this case would be inappropriate in light of the scope of his initial decree" (*id.* at 7a). Substantially agreeing with the district court's analysis, the court reasoned (*ibid.* (footnote omitted)):

> The purpose of Judge Pratt's 1973 decree was to require the Department to initiate appropiate enforcement proceedings under Title VI. It was directed at the Department's lassitude, if not recalcitrance, in fulfilling its responsibilities under that Act. However, Judge Pratt's 1973 decree, as affirmed with modifications by this court and as supplemented by him in 1977, did not purport to supervise or dictate the details of the Department's enforcement program, once that program culminated in an administrative proceeding, itself subject to judicial review, against a recipient state.

The court of appeals expressed concern about the much broader interpretation of the prior injunctive decrees urged by petitioners. In the court's view, their expansive view of the scope of this suit would "constitute this court as *perpetual supervisor* of the enforcement actions of the Department and of the desegregation policies of the states" (Pet. App. 10a (emphasis in original)). It would also result in an "excessive concentration of judicial power in a single

tribunal" in the District of Columbia (*id.* at 11a), to the detriment of the courts and people in other parts of the country (*id.* at 11a-12a). The court also stressed that petitioners "had ample opportunity to assert their rights through the normal routes of judicial review" by participating as parties in the proceedings in North Carolina but chose not to do so (*id.* at 16a-17a).

The court of appeals further observed that because the consent decree already had been entered by the district court in North Carolina, there was considerable doubt about the availability of effective relief to petitioners in the District of Columbia courts—especially in the absence of the State of North Carolina, which the court regarded as a likely indispensable party under Fed. R. Civ. P. 19(b) (Pet. App. 18a-19a). Moreover, the court indicated its unwillingness to place the Secretary of Education in the "unseemly" and "intolerable" position of having to choose between compliance with conflicting orders of two different district courts (Pet. App. 20a-21a).

Judge Wright dissented in an opinion joined in part by Chief Judge Robinson and Judges Wald and Mikva (Pet. App. 23a-106a). The dissent disagreed with the majority's interpretation of the prior decrees in this case as not furnishing a basis for relief to petitioners (*id.* at 26a). The dissent further contended that petitioners in any event would have a separate and enforceable right under Section 603 of Title VI, 42 U.S.C. 2000d-2, to obtain relief in the venue of their choice against allegedly arbitrary and capricious action by the Department (Pet. App. 26a). Accordingly, the dissent would have remanded to the district court to determine whether the Department's decision to settle its enforcement action against

North Carolina should be set aside and the administrative proceeding resumed (*id.* at 117a).[6]

ARGUMENT

Petitioners sought to invoke the jurisdiction of the district court in the District of Columbia in the now 13-year-old *Adams* litigation to obtain an order barring the Secretary of Education from entering into the proposed settlement with North Carolina on the ground that the proposed settlement was inconsistent with prior decrees in the *Adams* litigation. The court of appeals affirmed the district court's holding that its prior decrees did not extend to supervision of the resolution of a dispute with a school system after the initiation of enforcement proceedings required by the *Adams* decrees. This interpretation of the terms of those decrees is correct and, indeed, was dictated by the court of appeals' own en banc decision in *Adams* v. *Richardson*, *supra*, a decade earlier.

Because the decision below turns on an interpretation of prior judicial decrees by the courts that entered and modified them and creates no conflict with any other court of appeals, review by this Court plainly is not warranted. This is especially so in view of the fact that the settlement petitioners requested the district court to enjoin is now embodied in a consent decree that was entered by the district court in North Carolina 2½ years ago, after both courts below denied petitioners' request for emergency injunctive relief and after petitioners failed to seek emergency relief in this Court to prevent the

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[6] Judge Wright, in a portion of the dissent not joined by any of the other judges, also expressed the view that the North Carolina settlement should be disapproved on the merits (Pet. App. 92a-103a).

settlement from going forward. Even if the entire appeal has not been rendered moot as a result (see Pet. App. 90a-91a), entry of the consent decree in North Carolina at the very least would pose formidable obstacles to the ability of the courts below to grant effective relief. And because that decree has governed the administration of the North Carolina higher education system for several years, the public interest in repose and in orderly administration of justice weighs heavily against reopening of the dispute in a collateral proceeding at this late date.

The appropriate course for petitioners to follow if they are dissatisfied with the consent decree or North Carolina's performance under it is to seek to intervene in district court in North Carolina to have that decree reopened or enforced, assuming that petitioners have a sufficient stake in the matter to request that relief. We note, however, that at the time the *Adams* plaintiffs sought an injunction in district court and the consent decree was entered in North Carolina, the *Adams* plaintiffs did not include any citizens of North Carolina.[7] There also is no indication that any of the plaintiffs in the *Adams* suit had been subjected to discrimination by the North Carolina higher education system. There accordingly is no indication that the *Adams* plaintiffs even had standing to challenge the Secretary's entering into the settlement and consent decree. For this reason as well, review by this Court is not warranted.

1. The sole ground on which petitioners sought an injunction in district court was that the then-proposed

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[7] The *Adams* litigation never has been a class action insofar as Title VI issues are concerned, and not until new plaintiffs were substituted in 1982 were residents of North Carolina included (Pet. App. 16a n.39).

settlement of the dispute with North Carolina violated the April 1, 1977 order entered in the *Adams* litigation (Pet. App. 118a-119a; C.A. App. 18). The district court denied relief because of its conclusion that its previous order did not cover the present situation (Pet. App. 110a-117a).

The court of appeals also repeatedly emphasized that its holding was based on an interpretation of the scope of the district court's prior decrees in this litigation.[8] The court of appeals explained that the district court's initial 1973 decree and supplemental 1977 decree "reviewed the agency's prior policy of neglect in initiating enforcement proceedings and corrected this policy by decrees directing the initiation of enforcement" (Pet. App. 10a). Those decrees did not purport to reach the stage of proceedings involved in the current challenge, where a formal enforcement proceeding already had been initiated, extensive administrative proceedings had been conducted, and a proposed settlement—which was subject to review in another court—had been negotiated. "Rather, once the processes of administrative enforcement and subsequent judicial review are set in motion, the role of the district court's enforcement orders comes to an end" (*id.* at 17a n.40).[9]

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[8] The court of appeals began its analysis with a statement of this very point (Pet. App. 7a):

> Judge Pratt correctly interpreted the initial decree not to extend to supervision of the Department's settlement of its enforcement action against North Carolina. * * * [W]e affirm Judge Pratt's ruling that the injunction requested in this case would be inappropriate in light of the scope of his initial decree.

[9] The court of appeals noted that "litigation of judicially-mandated desegregation * * * has universally proceeded in

Thus, as the court of appeals held in the instant proceeding, relief *under* the earlier *Adams* decision and the decrees implementing that decision must be limited to situations indicating persistence by the Department in the conduct that gave rise to them—namely, a "systemic defalcation on the part of the Department," under which it had " 'consciously and expressly adopted a general policy which [was] in effect an abdication of its statutory duty' " (Pet. App. 9a, 12a-13a (quoting *Adams* v. *Richardson*, 480 F.2d at 1162)). The court had no occasion here to consider what conduct might rise to that level, observing only that "the Department's commencement of an enforcement action that is later settled through a compliance agreement approved by an appropriate district court does not qualify" (Pet. App. 14a).

Other considerations reinforce the court's view that the prior *Adams* decrees should not be construed to cover the present situation. To accept petitioners' position would, as the court of appeals observed, "encroach upon the role of the institutions responsible for implementing Title VI and constitute [the District of Columbia Circuit] as *perpetual supervisor* of the enforcement actions of the Department and of the desegregation policies of the states" (Pet. App. 9a-11a (emphasis in original)). Moreover, to interpret the prior *Adams* decrees as embodying a fixed conception of a specific plan for compliance with Title VI by a recipient of federal funds "would effectively reverse the normal relations between agency

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the districts where the desegregation decrees are to be implemented" (*id.* at 12a n.34). See *Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955). This principle "correctly informed Judge Pratt's interpretation of the decrees at issue in this case" (Pet. App. 12a n.34).

and court[,]" since "[n]ormally the court reviews the decisions of the agency rather than the agency simply obeying prior directives of the courts" (Pet. App. 10a).

Finally, it is significant that even though the courts below held that the *Adams* decrees do not furnish petitioners with a basis for bringing a collateral challenge to the proposed settlement, petitioners nevertheless did have an opportunity to present their objections to the proposed settlement in the course of the proceedings in district court in North Carolina. But they chose to participate amicus curiae in those proceedings rather than to intervene as parties, even though the district court and court of appeals in the District of Columbia had turned down their request for emergency relief to bar the Secretary from entering into the settlement. Petitioners thereby deliberately passed up the opportunity to obtain further review—in the court of appeals for the Fourth Circuit—in the event that the North Carolina district court should approve the settlement and enter a consent decree, as ultimately occurred. See Pet. App. 15a-18a. Petitioners therefore do not have a strong equitable claim to a grant of that same relief by the district court in the District of Columbia.[10]

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[10] Contrary to petitioners' contention (Pet. 30-33), the court of appeals did not announce a rule of " 'mandatory intervention' " that deprives them of due process by giving binding effect to the North Carolina decree even though petitioners were not parties to it. The court expressly stated that it had "no occasion to give collateral estoppel effect to the North Carolina judgment" (Pet. App. 17a n.39). The court discussed petitioners' opportunity to intervene in the North Carolina proceedings only to demonstrate why the effect of its ruling was not to foreclose all judicial review of the Secre-

Moreover, as the court of appeals also observed (Pet. App. 12a, 13a & n.35), the requirements of Title VI also may be enforced in a private suit against the recipient of federal funds. See also *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), slip op. 11-12 (opinion of White, J.); *id.* at 1 (Rehnquist, J., concurring); *id.* at 10-20 (Marshall, J., dissenting); *id.* at 1-5 (Stevens, J., dissenting). This means of obtaining judicial relief also remains open to petitioners.

2. Petitioners nevertheless contend (Pet. 23-46) that review is warranted because the court of appeals has held that the actions of the Secretary in settling an enforcement proceeding are not subject to judicial review even though, in petitioners' view (Pet. 23-24, 28), such a right of review is conferred by Section 603 of Title VI, 42 U.S.C. 2000d-2. But of course that is not what the court of appeals held. Petitioners did not bring an independent suit in district court in the District of Columbia, under Section 603 or the Administrative Procedure Act, seeking

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tary's actions, as petitioners had contended (Pet. App. 15a-17a).

Petitioners' objection (Pet. 33-35) to the decision below on the ground that the district court in North Carolina did not have jurisdiction is equally flawed. As this Court explained long ago in *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928), it is only necessary that the court entering the consent decree have "jurisdiction both of the general subject matter * * * and of the parties." The district court in North Carolina unquestionably had jurisdiction over the subject matter (28 U.S.C. (Supp. V) 1331) and the parties (28 U.S.C. 1391(e)). If, as petitioners contend (Pet. 33-34), the North Carolina court erred in entering the decree, their objections are directed to the wrong courts in these proceedings. *Swift & Co.* v. *United States*, 276 U.S. at 326, 330. Their remedy lies in the court that entered the decree.

judicial review of the Secretary's decision to settle the enforcement action. They instead sought relief under the prior decrees in the *Adams* litigation, and the court of appeals denied relief because it determined that the *Adams* decrees did not reach the present situation. Since petitioners did not seek review of the proposed settlement outside the context of the ongoing *Adams* litigation, the court of appeals had no occasion to consider the availability of such review, except to observe that a suit directly against North Carolina remained available. There accordingly is no occasion for this Court to do so either. This case would not be an appropriate vehicle in which to consider that question in any event, because the dispute between the Secretary and North Carolina already was before another district court and the settlement between those parties was intended to be incorporated in a consent decree in that other court. This factor surely would support the denial of injunctive relief by the district court in the District of Columbia even if petitioners did have an independent right of review under Section 603, since that right could be exercised as readily in the North Carolina proceeding.

In any event, petitioners are mistaken in their assertion that Section 603 itself grants them a right of action against the funding agency. The first sentence of Section 603, upon which they rely (Pet. 24), provides: "Any department or agency action taken pursuant to Section 2000d-1 of this title [Section 602] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." This sentence was intended principally to preserve established statutory procedures under which a recipient of federal funds may obtain judicial review of an agency's decision to terminate funding or to take

other action against the recipient of funds. See *Gardner* v. *Alabama*, 385 F.2d 804, 810-811 (5th Cir. 1967); 110 Cong. Rec. 7060-7061 (1964) (remarks of Sen. Pastore (citing 20 U.S.C. 641(b) and 42 U.S.C. (1958 ed.) 291j)). That sentence does not confer a right of review where, as here, such a right has not been granted under the statutory framework governing the funding program.

Nor does the first sentence of Section 603 recognize a right of action under the APA, as petitioners also contend (Pet. 24). When Congress contemplated that agency action under Section 602 would be subject to review pursuant to the APA, it said so expressly in Section 603 itself. Thus, the second sentence of Section 603 provides that if agency action terminating or refusing to grant financial assistance upon a finding of failure to comply with Title VI is not otherwise subject to judicial review, "any person aggrieved * * * may obtain judicial review of such action in accordance with chapter 7 of title 5 [the APA]." There is, however, no similar recognition in Section 603 of a right of review under the APA of actions by the Secretary other than the termination or refusal to grant funds, including, as here, the settlement of a dispute with a funding recipient that results in the continuation of funding.[11] Thus, if persons in petitioners' position have a right to judicial review under the APA of the Secre-

[11] Petitioners contend (Pet. 24) that the legislative history of Section 603 reflects an understanding that all actions by the funding agency under Section 602 are subject to judicial review pursuant to the APA. However, the only legislative history they cite (H.R. Rep. 914, 88th Cong., 1st Sess. 25-26 (1963)) likewise mentions the APA only in the context referred to in the *second* sentence of Section 603, which applies where funding is to be terminated or denied.

tary's actions in the implementation of Title VI, it must be *despite* the failure of Section 603 to provide for that right, even though it does expressly provide for review pursuant to the APA in other circumstances.[12] The courts should not lightly find an implied or additional right of review when Congress has expressly granted that right in some circumstances but not in others. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).[13]

There is no need to pursue the matter further, however, because the court of appeals in this case did not address the existence or scope of an independent action under Section 603 or the APA. The conclusion by the district court and court of appeals that the settlement of the dispute with North Carolina was beyond the continuing supervision and con-

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[12] The en banc court of appeals in the 1973 *Adams* v. *Richardson* decision did not hold that Section 603 recognizes a right of review under the APA; the court rested its decision on the APA standing alone. 480 F.2d at 1161-1163. See also *Council of and for the Blind of Delaware County Valley* v. *Regan*, 709 F.2d 1521, 1531 n.69 (D.C. Cir. 1983) (en banc) ("Congress did not expressly provide a remedy for the agency's failure to enforce the nondiscrimination provision of Title VI."). Moreover, although this Court cited the 1973 *Adams* v. *Richardson* decision in *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n.41 (1979), it noted the disruptive nature of an APA suit (*ibid.*) and elsewhere discussed legislative history of Title VI indicating an intent *not* to subject funding agencies to suit (*id.* at 715, 716 n.51).

[13] Of course, even where review is available under the APA, review may be obtained only by a person "adversely affected" or "aggrieved" by the agency action in question. 5 U.S.C. 702. Here, there is no indication that any of the *Adams* plaintiffs had a sufficient stake in the issues concerning desegregation of the North Carolina university system to satisfy this requirement.

trol of the district court under the *Adams* decrees does not warrant further review.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1984

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[14] In March 1983, the district court issued other orders that impose detailed time limits and other restrictions on the Secretary's investigation of all complaints that may be filed under Title VI and other antidiscrimination provisions. The 1978 en banc decision in *Adams* v. *Richardson*, does not support this sort of ongoing judicial interference with the Secretary's discretion in fashioning an appropriate enforcement program under Title VI and similar statutes. Cf. *Cannon* v. *University of Chicago*, 441 U.S. at 707 n.41. The Secretary has taken an appeal to the court of appeals from those orders.

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